INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Question presented	4
Statement	4
Summary of argument	6
Argument:	
I. The Court has jurisdiction of this appeal	10
II. 42 U.S.C. 1971 (a) and (c) are admittedly constitutional as applied to the facts of this case, and the question of the constitutionality of their application in other hypothetical circumstances should not have been considered by the court below	16
A. The proper scope of judicial review is to determine whether the statute is valid as applied to the facts of the particular case	17
B. Constitutional application of the Act should be upheld as separable from the application deemed unconstitutional	22
III. 42 U.S.C. 1971 (a) and (c) are constitutional	27
A. Introductory	27
B. The language of 42 U.S.C. 1971 indicates that subsections (a) and (c), when taken together, are concerned only with action which can be deemed "State Action"	31
C. Decisions of this court and the lower federal courts have recognized and applied Section 1971(a) as a proper implementation of the Fifteenth Amendment.	35
D. The legislative history of 42 U.S.C. 1971(a) clearly demonstrates that it has, at all times, been intended to apply only to state action	38
1. The legislative history of Section 1971(a) as enacted in 1870 shows that it was intended to implement the Fifteenth Amendment	39

Argument—Continued
III. 42 U.S.C. 1971, etc.—Continued
D. The legislative history, etc.—Continued
2. The legislative history of the Civil Rights Act of 1957 demonstrates that Congress intended by Section 1971(a) when used in conjunction with Section 1971(c) to proscribe only those acts and practices which violate the Fifteenth Amendment ..... Page 45
a. Hearings 46
b. Committee reports 51
c. Floor debate 53
E. 42 U.S.C. 1971 (a) and (c) can and should be construed so as to save rather than to destroy them 55
Conclusion 58

CITATIONS

Cases:

The Abby Dodge, 223 U.S. 166 23
Alpha Portland Cement Co. v. *Knapp*, 230 N.Y. 48 23
Ashwander v. *T.V.A.*, 297 U.S. 288 58
Baskin v. *Brown*, 174 F. 2d 391 ..... 29, 38
Blackmer v. *United States*, 284 U.S. 421 ..... 18, 21, 22
Blodgett v. *Holden*, 275 U.S. 142 57
Burton v. *United States*, 196 U.S. 283 18
Byrd v. *Brice*, 104 F. Supp. 442 29
California Water Service Co. v. *Redding*, 304 U.S. 252 13
Carmichael v. *Southern Coal Co.*, 301 U.S. 495 18
Chapman v. *King*, 154 F. 2d 460, certiorari denied, 327 U.S. 800 38
Coffman v. *Breeze Corporations*, 323 U.S. 316 58
Davis v. *Schnell*, 81 F. Supp. 872, affirmed, 336 U.S. 933 29
Dorchy v. *Kansas*, 264 U.S. 286 23
El Paso & N.E. Ry. Co. v. *Gutierrez*, 215 U.S. 87 26
Employers' Liability Cases, The, 207 U.S. 463 ..... 24, 26
Fleming v. Rhodes, 331 U.S. 100 ..... 12, 18
Garment Workers v. *Donnelly Co.*, 304 U.S. 243 12
Guinn v. *United States*, 238 U.S. 347 ..... 29, 30
Heald v. *District of Columbia*, 259 U.S. 114 19

Cases—Continued

	Page
Hurd v. *Hodge*, 334 U.S. 24	10, 58
Illinois Central Railroad v. *McKendree*, 203 U.S. 514	26
James v. *Bowman*, 190 U.S. 127	28
Jeffrey Mfg. Co. v. *Blagg*, 235 U.S. 571	21
Lee v. *Bickell*, 292 U.S. 415	13
McComb v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137	17
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	23
Nixon v. *Condon*, 286 U.S. 73	38
Ogden v. *Saunders*, 12 Wheat. 213	56
Reddix v. *Lucky*, 252 F. 2d 930	29, 38
Reid v. *Covert*, 351 U.S. 487, decision vacated, 354 U.S. 1	12
Rescue Army v. *Municipal Court*, 331 U.S. 549	58
Rice v. *Elmore*, 165 F. 2d 387, certiorari denied, 333 U.S. 875	29, 38
Screws v. *United States*, 325 U.S. 91	58
Siebold, Ex parte, 100 U.S. 371	30
Smith v. *Allwright*, 321 U.S. 649	29, 38
Steamship Co. v. *Emigration Commissioners*, 113 U.S. 33	18
Sterling v. *Constantin*, 287 U.S. 378	13
Terry v. *Adams*, 345 U.S. 461	8, 29, 30, 35, 36, 37, 38
Thornton v. *Martin*, decided, November 23, 1955 (N.D. Ga.), 1 Race Relations Law Reporter (1956)	29
Trade-Mark Cases, 100 U.S. 82	26
United States v. *Borden Co.*, 308 U.S. 188	16
United States v. *Classic*, 313 U.S. 299	30, 52
United States v. *Dennis*, 183 F. 2d 201, affirmed, *Dennis* v. *United States*, 341 U.S. 494	10, 24
United States v. *Gale*, 109 U.S. 65	30
United States v. *Harriss*, 347 U.S. 612	10, 22, 58
United States v. *Hastings*, 296 U.S. 188	15
United States v. *Petrillo*, 332 U.S. 1	58
United States v. *Reese*, 92 U.S. 214	9, 21, 24, 26, 27, 28
United States v. *Rumely*, 345 U.S. 41	10, 56
United States v. *South-Eastern Underwriters Assn.*, 322 U.S. 533	16
United States v. *Wayne Pump Co.*, 317 U.S. 200	15
United States v. *Williams*, 341 U.S. 70	30
United States v. *Wurzbach*, 280 U.S. 396	20
Virginia Ry. Co. v. *Federation*, 300 U.S. 515	18
Yarbrough, Ex parte, 110 U.S. 651	30
Yazoo and Miss. R.R. v. *Jackson Vinegar Co.*, 226 U.S. 217	19

Constitution and statutes:

United States Constitution: Page

Article I, Sections 2 and 4 54
Article VI 34
Sixth Amendment 21
Fourteenth Amendment 2, 30
Fifteenth Amendment 2, 7, 8, 11, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 44, 45, 46, 54, 55
Section 2 ..... 27, 28
Section 6 33
Civil Rights Act of 1957, 71 Stat. 634, Public Law 85-315 ..... 9, 24, 31, 39, 44, 45, 55
Section 131(a) 40
Section 131(b) 40
Criminal Appeals Act, 18 U.S.C. 3731 15
Enforcement Act of May 31, 1870, c. 114, Section 1, 16 Stat. 140 ..... 9, 27, 29, 38, 40, 44
Sections 3 and 4 ..... 25, 27, 28
Federal Corrupt Practices Act, 43 Stat. 1070, *et seq* 20
R.S. 2004 (1874) 29, 40
8 U.S.C. (1946 ed.) 31 ..... 29, 36, 40
8 U.S.C. (1946 ed.) 43 36
8 U.S.C. (1946 ed.) 47 36
18 U.S.C. 241 ..... 28, 30, 33, 48
18 U.S.C. 242 ..... 28, 48
18 U.S.C. 594 ..... 32, 48
18 U.S.C. 602 20
28 U.S.C. 1252 (62 Stat. 928) 2, 6, 11, 13, 14, 15
28 U.S.C. 1291 14
28 U.S.C. 1292 14
42 U.S.C. 1971 (R.S. 2004, as amended, 71 Stat. 637) 3, 29, 31, 40, 48, 55
42 U.S.C. 1971(a) ..... 3, 5, 6, 7, 8, 9, 10, 17, 19, 21, 27, 28, 30, 31-35, 36, 37, 38, 39, 40, 45-48, 51, 52, 53, 54, 55.
42 U.S.C. 1971(b) 3, 29, 31, 32, 33, 45, 52, 53
42 U.S.C. 1971(c) 4, 6, 7, 8, 10, 11, 13, 16, 17, 19, 21, 27, 30, 31, 32, 45, 46, 55
42 U.S.C. 1971(d) 29
42 U.S.C. 1971(e) 29
42 U.S.C. 1982 ..... 10, 58
42 U.S.C. 1983 ..... 28, 35, 36, 37, 38, 52
42 U.S.C. 1985 ..... 28, 36, 37

Miscellaneous:

	Page
89 Cong. Globe 1459	39
90 Cong. Globe 2808	39
91 Cong. Globe 2942	39
91 Cong. Gobe 3479	40
91 Cong. Globe 3480	40
91 Cong. Globe 3485	41
91 Cong. Globe 3560	41
91 Cong. Globe 3571	42
91 Cong. Globe 3611	43
91 Cong. Globe 3655	43
91 Cong. Globe 3661	41, 43
91 Cong. Globe 3663	41
91 Cong. Globe 3666	43
91 Cong. Globe 3670	43
91 Cong. Globe 3671	43
91 Cong. Globe 3679	42
91 Cong. Globe 3684	43
91 Cong. Globe 3690	43
91 Cong. Globe 3752	43
92 Cong. Globe 3872	43
92 Cong. Globe 3882	44
92 Cong. Globe 3915	39
94 Cong. Globe 357	44
94 Cong. Globe 432	44
94 Cong. Rec. 927–928	46
103 Cong. Rec. 8498	54, 55
103 Cong. Rec. 8653	54
103 Cong. Rec. 8705	54
103 Cong. Rec. 8856	54
103 Cong. Rec. 9020	54
103 Cong. Rec. 9396	54
103 Cong. Rec. 10988	54
103 Cong. Rec. 11081	54
103 Cong. Rec. 11475	53
103 Cong. Rec. 11476	53
103 Cong. Rec. 11684	54
103 Cong. Rec. 11697	54
103 Cong. Rec. 11698	54
103 Cong. Rec. 11834	54, 55
103 Cong. Rec. 12149	54
103 Cong. Rec. 12150	54

Miscellaneous—Continued — Page

103 Cong. Rec. 12310 — 54
103 Cong. Rec. 12564 — 54
103 Cong. Rec. 12828 — 54
103 Cong. Rec. 12829 — 54
103 Cong. Rec. 12898 — 54
103 Cong. Rec. 12900 — 54
103 Cong. Rec. 13006 — 54
103 Cong. Rec. 13112 — 54
103 Cong. Rec. 13120 — 54
103 Cong. Rec. 13126 — 54
103 Cong. Rec. 13138 — 54
103 Cong. Rec. 13139 — 55
103 Cong. Rec. 13319 — 54
103 Cong. Rec. 13320 ff — 54
103 Cong. Rec. 13322 — 54
103 Cong. Rec. 13324 — 54
103 Cong. Rec. 13333 — 54
103 Cong. Rec. 13732 — 54
103 Cong. Rec. 13876 — 54, 55
103 Cong. Rec. 13881 — 54
103 Cong. Rec. 16402 — 54
Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., 1957 House Hearings:
589 — 47
591 — 48
606–607 — 48
656, 659 — 50
681 — 50
738 — 50
808 — 50
903 ff — 50
989 — 50
1173 — 50
1219 — 50
Hearings before the Committee on Rules, House of Representatives, 84th Cong., 2d Sess., on H.R. 627, p. 47 — 46
Hearings before the Committee on Rules, House of Representatives, 85th Cong., 1st Sess., on H.R. 6127 — 49

Miscellaneous—Continued
Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. — Page 47
1957 Senate Hearings:
1 ff. — 50
2–3 — 47
46 ff. — 50
180 ff. — 50
237 — 50
261 — 50
270 ff. — 50
308 — 50
450 — 50
502 ff. — 50
532 ff. — 50
564–565 — 50
H. Rep. No. 212, 75th Cong., 1st Sess. — 12
H. Rep. No. 2187, 84th Cong., 2d Sess. — 46
H. Rep. No. 291, 85th Cong., 1st Sess. — 9, 51, 52
H.R. 1293, 41st Cong., 2d Sess. — 39
H.R. 4682, 81st Cong., 1st Sess. — 46
H.R. 29, 82d Cong., 1st Sess. — 46
H.R. 5945, 82d Cong., 2d Sess. — 46
H.R. 405, 83d Cong., 1st Sess. — 46
H.R. 627, 84th Cong., 2d Sess. — 46
H.R. 6127, 85th Cong., 1st Sess. — 46
1 Race Relations Law Reporter 213 (1956) — 29
S. 810, introduced April 19, 1870 — 39, 40, 41, 43, 44, 45
S. 1725, 81st Cong., 1st Sess. — 46
S. 907, 84th Cong., 1st Sess. — 46
S. 83, 85th Cong., 1st Sess. — 47, 53
Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 — 24
To Secure These Rights, The Report of the President's Committee on Civil Rights (1947) — 45

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 64

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES GRIGGS RAINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 24–40) is reported at 172 F. Supp. 552.

JURISDICTION

The judgment of the District Court was entered on April 16, 1959 (R. 41). The jurisdictional statement was filed on May 12, 1959. On June 29, 1959, this Court entered an order postponing decision of the question of jurisdiction to the hearing on the merits (R. 45). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

[1] The jurisdictional question is discussed at pp. 10–16, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment to the Constitution of the United States provides that:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

28 U.S.C. 1252 (62 Stat. 928) provides that:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court

of the Virgin Islands and any court of record of Alaska, Hawaii and Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

42 U.S.C. 1971 (R.S. 2004, as amended, 71 Stat. 637) provides in pertinent part that:

(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Repre-

sentatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

QUESTION PRESENTED

Whether the District Court erred in construing subsections (a) and (c) of 42 U.S.C. 1971 to authorize injunctive suits by the Attorney General with respect to private action depriving citizens of the right to vote, and in holding that, as so construed, the subsections were unconstitutional *in toto*, in a case in which the only action involved was state, not private, action.

STATEMENT

On September 4, 1958, the United States commenced this suit under 42 U.S.C. 1971(c) in the United States District Court for the Middle District of Georgia. The complaint sought to enjoin certain designated state officials, the registrars and deputy

registrars of voters of Terrell County, Georgia, from refusing, for reasons of race or color, to permit qualified Negro citizens of that county to register to vote; and to enjoin these state officials from engaging in acts and practices which would deprive qualified Negro citizens of the right, secured to them by subsection (a) of Section 1971, to be permitted to vote at any election without distinction of race or color. Such acts and practices, the complaint alleged, included arbitrary and discriminatory delays in processing applications for registration of Negro citizens; arbitrary refusals to register Negroes who demonstrated themselves to be fully qualified to register to vote under the laws of Georgia; and discriminatory application of more difficult and more stringent registration standards to Negro applicants for registration than the standards applied to white applicants (R. 1–16).

On September 23, 1958, the defendants filed a motion to dismiss on the ground, among others, that 42 U.S.C. 1971(a) is unconstitutional in that it exceeds the federal power under the Fifteenth Amendment (R. 17–21).

The District Court found that the complaint stated a cause of action under the statute (R. 27), but dismissed the action on the ground that Section 1971(c), in providing for the enforcement of Section 1971(a), is unconstitutional (R. 29–40). The court held that subsection (c) authorizes the Attorney General to institute civil suits to prevent private action as well as action under color of law, and that its enactment, therefore, was beyond the power conferred upon Con-

gress by Section 2 of the Fifteenth Amendment (R. 39–40). The court also held, in effect, that it had no power to limit the language of subsections (a) and (c) by construing them; that it could not separate the valid aspect from the invalid part of subsections (a) and (c); and that subsection (c) was therefore void even when applied to restrain state action (R. 37–40).

SUMMARY OF ARGUMENT

I

This Court has jurisdiction of this appeal under 28 U.S.C. 1252. That section provides for a direct appeal to this Court from a judgment of any court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party. The purpose of Section 1252 is to enable immediate final determination by this Court of the validity of an act of Congress so that, if it is upheld, its enforcement will not be unduly suspended. This appeal comes directly within the language of the section. The District Court explicitly held that 42 U.S.C. 1971(c), when used to enforce 42 U.S.C. 1971(a), is unconstitutional.

Under Section 1252, a direct appeal lies to this Court whenever a district court has decided that a statute is unconstitutional, even if such decision rests on an erroneous construction of the statute. The controlling fact, for purposes of determining whether a direct appeal may be taken, is the holding of unconstitutionality, not the process of reasoning by which that holding is reached. In every case, in varying degrees, statutory construction is a necessary

preliminary step to a determination of constitutionality. This was also true here, but the errors of construction with respect to the meaning of Section 1971(a), and the separability of its applications, on the basis of which the District Court reached the constitutional issue, were specifically not the grounds on which the complaint was dismissed.

II

The District Court held that Section 1971(c), read with (a), is broad enough to permit the Attorney General to institute suits for injunctive relief against private action, as well as against state action, and that it is therefore unconstitutional as beyond the power of Congress under Section 2 of the Fifteenth Amendment.

It was error to have reached the constitutional question because here there was action under color of law, not private action. The question of the applicability of the statute to private action was, therefore, plainly not necessary to the decision. The court should not have considered the question of the constitutionality of the statute as it might hypothetically be applied to a situation not before the court.

The District Court erred, in any event, in holding that 42 U.S.C. 1971 (a) and (c) are unconstitutional *in toto,* inasmuch as those sections are concededly valid as applied to this case, and the valid application of those sections here is clearly separable from allegedly invalid applications in hypothetical situations of private action not here involved.

III

Subsections (a) and (c) of Section 1971 are constitutional. Subsection (a) declares a right, against state action, to be entitled and allowed to vote in any election without distinction of race. By its own terms, subsection (c) applies only where subsection (a) has been violated—it does not, and cannot, broaden the scope of subsection (a).

The language of Section 1971(a) shows that it is concerned only with governmental action and is an implementation of the Fifteenth Amendment. This subsection declares the right to vote without distinction of race, as does the Fifteenth Amendment. It declares the right to be that of "citizens of the United States", again using the terminology of the Fifteenth Amendment. It specifically states that such right exists, any constitution, law, custom, usage or regulation of any state to the contrary notwithstanding. The conclusion that state action alone is reached is further confirmed by contrasting the language of subsection (a) with that of subsection (b) which, by way of distinguishing its coverage from that of subsection (a), makes clear that it applies to all persons "whether acting under color of law or otherwise."

Subsection (a) has been a part of the statutory law for over 89 years and has been invoked and relied on in many cases in the federal courts. This Court, in the recent case of *Terry* v. *Adams*, 345 U.S. 461, gave full effect to this section and held that it was enacted pursuant to the Fifteenth Amendment.

The legislative history of Section 1971(a), both as originally enacted in 1870 and as reenacted in 1957,

demonstrates that it was intended to implement the Fifteenth Amendment.

Section 1971(a) was originally enacted as Section 1 of the Enforcement Act of May 31, 1870. Both opponents and proponents of the measure recognized that its purpose was to implement the Fifteenth Amendment, although there was some dispute as to whether or not that Amendment proscribed private action as well as action taken under color of law.

The legislative history of the Civil Rights Act of 1957 makes it clear that Section 1971(a), as incorporated into the 1957 Act (71 Stat. 634, 637), was intended to apply only to governmental action. For example, the House Report (H. Rep. No. 291, 85th Cong., 1st Sess.), in explaining the meaning of the section, quoted a letter from Attorney General Brownell which specifically stated (p. 15) that Section 1971(a) "is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law * * *." The same understanding was repeatedly expressed in the hearings, debates, and the committee reports.

The principle is well settled that if an act is capable of alternative constructions only one of which would render the statute invalid, it should be construed so as to save rather than destroy the law. The court below, however, did not follow this rule, relying on *United States* v. *Reese*, 92 U.S. 214, as authority that the courts cannot limit general words of a statute so as to make it constitutional. But that interpreta-

tion of the *Reese* case has been rejected by this Court. See, *e.g., Dennis* v. *United States,* 341 U.S. 494; *United States* v. *Rumely,* 345 U.S. 41; *United States* v. *Harriss,* 347 U.S. 612. In these and other cases, which involved far more serious doubts as to the constitutionality of the acts there invoked than does the statutory provision involved here, this Court limited general words by construing them so as to preserve constitutionality.

The language of Section 1971(a) is similar to that used in 42 U.S.C. 1982. The latter provision was held in *Hurd* v. *Hodge,* 334 U.S. 24, to be applicable only to governmental action. The same construction should have been adopted here.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS APPEAL

On motion of the appellees, the District Court entered an order dismissing the complaint before trial. The dismissal was based on a finding that 42 U.S.C. 1971(c), *supra,* p. 4, which was the statutory provision under which the action was brought, is unconstitutional. In holding this provision to be unconstitutional, the District Court based its finding on the relationship of subsection (c) to subsection (a), which it was intended to implement. Before reaching the question of constitutionality the District Court had rejected the arguments that the complaint failed to state a cause of action (R. 27) and that the complaint lacked equity (R. 26–27). On constitutionality, the court overruled the contention that the statute was in-

valid because it failed to require exhaustion of other remedies before an injunction could be sought. Then, on the main issue of whether the statute went beyond the authority granted by the Fifteenth Amendment because it applied to private action, the court held Section 1971(c) unconstitutional, not on the basis of its application in the present case where state action alone was sought to be enjoined, but because in other cases the section, as construed by the court, would proscribe private action and thus would exceed the powers of Congress.

Jurisdiction of this appeal is based on 28 U.S.C. 1252, *supra*, pp. 2–3. That section provides for an appeal to this Court from an interlocutory or final order of any court of the United States holding an act of Congress unconstitutional in any civil action to which the United States is a party. This case, therefore, comes directly within the terms of Section 1252.

The language of 28 U.S.C. 1252 is unqualified. If a court of the United States holds an Act of Congress unconstitutional in a civil action to which the United States is a party, the law provides that any party may appeal to this Court. The purpose of this provision is clear. Congress intended to provide for an immediate and final review by this Court of determinations by lower courts that acts of Congress are unconstitutional, so that the enforcement of such acts will not be needlessly impeded in the event that the decision of the lower court is determined to be incorrect. On the other hand, if an act is found by this Court to be unconstitutional, Congress can then

take appropriate action to remedy the defect, if possible.[2]

In accord with the language and purpose of the law, this Court has accepted jurisdiction whenever the statutory terms have been met and, when it has commented on the section, it has indicated that the statute should be given effect as written. Thus, in *Fleming* v. *Rhodes,* 331 U.S. 100, where the question was whether the right to appeal should be limited to situations where the general application of a statute was involved, the Court upheld its jurisdiction to whatever extent unconstitutionality had been found, saying at page 104:

> To limit the generality of the language of § 2 of the Act of August 24, 1937, to cases that involved only the constitutionality as a whole of the challenged statutes might seriously impair prompt determinations of matters of great public interest. Litigants may challenge the constitutionality of a statute only in so far as it affects them. We hold that jurisdiction of the appeal from the challenged order is conferred upon this Court by 28 U.S.C. § 349a.

And see *Garment Workers* v. *Donnelly Co.,* 304 U.S. 243, 249; *Reid* v. *Covert,* 351 U.S. 487, 490, subsequently vacated on other grounds, 354 U.S. 1.

It is our position that the District Court in this case erred in even reaching a constitutional question involved in an application of the statute which was not in the case before the court and that it also erred in the construction that it gave the statute. But a re-

[2] This purpose is made clear from the legislative history. See H. Rep. No. 212, 75th Cong.; 1st Sess., p. 2.

view of these non-constitutional questions—a review which is necessary in order for this Court to follow its traditional policy of avoiding questions of constitutionality whenever possible—does not detract in any way from the plain fact that the District Court, having disposed of those questions, held 42 U.S.C. 1971(c) unconstitutional as a whole—and that is the crucial fact which gives this Court jurisdiction by way of direct appeal.[3]

Section 1252 provides for a direct appeal to this Court in any case where the *decision* is that an Act of Congress is unconstitutional; it does not provide that such an appeal may not be taken where there is a preliminary issue of statutory construction. It may well be that there is little or no disagreement between the parties as to constitutionality once the problem of construction is resolved; and in that instance the more actively contested question in the District Court may be that of construction. But the decision would still be that an Act of Congress is unconstitutional, and, under the plain language of Section 1252, what governs

[3] An analogy can be drawn with the powers of three-judge courts. Whenever a substantial constitutional question is presented, a three-judge court has jurisdiction and it retains this jurisdiction even if the ultimate decision turns on a non-constitutional issue. *Sterling* v. *Constantin*, 287 U.S. 378; *California Water Service Co.* v. *Redding*, 304 U.S. 252, 255–256. And this Court, too, has direct appellate jurisdiction regardless of the non-constitutional outcome of the case in the three-judge court. *Lee* v. *Bickell*, 292 U.S. 415. By the same reasoning, this Court has jurisdiction under Section 1252 where the District Court's decision was that a statute is unconstitutional, and it retains this jurisdiction to decide the merits even if it turns out that the case can, or must, be decided on a preliminary, non-constitutional ground.

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in a case like this, if a lower court
reaching a constitutional question
cues a statute and on the basis of
an act to be unconstitutional, then

the case may come to this Court directly even though a contrary decision on the non-constitutional issues would have required an appeal to a court of appeals (*i.e.*, if the act were held constitutional). Moreover, the initial issue, at least, before this Court in such circumstances is not the constitutional one, but the correctness of the decision on the preliminary matters. But jurisdiction under 28 U.S.C. 1252 cannot depend upon what the District Court should have done, or upon its reasoning in reaching the result of unconstitutionality. To accomplish the purposes of Section 1252, the appellate jurisdiction of this Court must attach once the statute is held unconstitutional, regardless of the grounds on which such holding is based.

This view of the scope to be given Section 1252 is not inconsistent with the limitation on the Court's jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731. That Act permits direct review where the constitutionality or construction of a statute is the basis for the dismissal of a criminal case, but does not permit appeal where the issue is the construction of the indictment. Under that provision, the Court has refused to accept jurisdiction where an indictment is dismissed on the basis of statutory construction and also on an independent ground of a defect in the pleadings.[4] *United States* v. *Hastings*, 296 U.S. 188; *United States* v. *Wayne Pump Co.*, 317 U.S. 200,

[4] A comparable situation under the Act here in question would occur where a court held that under the Act the complaint failed to state a cause of action *and* that, if it did, it would be unconstitutional.

But where the insufficiency of an indictment is linked with the sufficiency of the charge under a construction of the statute, the Court accepts the appeal on the theory that the basic issue is the construction of the statute rather than the sufficiency of the indictment. *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533. That situation is comparable to that presented on this appeal.

It may be noted that here the finding of unconstitutionality was not incidental to the order of dismissal; it was not an alternative basis or a dictum, but was the sole ground for the order. The rulings on the preliminary non-constitutional issues did no more than set the stage for the decision on unconstitutionality. And the court specifically and as a necessary step in reaching its order of dismissal held 42 U.S.C. 1971(c) unconstitutional. That holding created the occasion and necessity for a direct appeal to this Court.

II

42 U.S.C. 1971 (a) AND (c) ARE ADMITTEDLY CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, AND THE QUESTION OF THE CONSTITUTIONALITY OF THEIR APPLICATION IN OTHER HYPOTHETICAL CIRCUMSTANCES SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT BELOW

The District Court reached the result of unconstitutionality by the use of a method which was erroneous in two respects. The approach employed was this: (1) disregarding the facts of the case, the court tested

the validity of the statute in the abstract and was thus led to the holding that, the act was invalid because it might conceivably be sought to be applied in some hypothetical case in an unconstitutional way; and (2) it held that such a hypothetical invalid application could not be separated from the valid application in this case. The District Court committed error in both of these steps and, therefore, in its conclusion.

A. THE PROPER SCOPE OF JUDICIAL REVIEW IS TO DETERMINE WHETHER THE STATUTE IS VALID AS APPLIED TO THE FACTS OF THE PARTICULAR CASE

> * * * I think it always unwise for a court to cross hypothetical constitutional bridges; crossing actual ones is dangerous enough.[5]

The court below disregarded this admonition when it considered the question of whether 42 U.S.C. 1971 (a) and (c) are unconstitutional in so far as they might forbid private acts depriving citizens of the right to vote. The fact is that the case before the court involved state action, not private action. Nevertheless, the court stated, "* * * we must close our mind to the allegations of the complaint in the instant case" (R. 30), and, "* * * it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it" (R. 30). This was plain error.

Judicial review of the constitutionality of acts of Congress has its justification in necessity. It is appropriate only when essential to the decision of the case.

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[5] Concurring opinion of Judge Frank in *McComb* v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137, 141 (C.A. 2).

See, *e.g., Burton* v. *United States,* 196 U.S. 283, 295. From this principle have evolved two fundamental rules of construction, both of which are applicable here, and both of which were disregarded by the District Court: (1) the constitutionality of statutes must not be tested in the abstract, without reference to the application of the statute involved in the case at hand, and (2) litigants may challenge the constitutionality of a statute only in so far as it affects them. *Fleming* v. *Rhodes,* 331 U.S. 100; *Blackmer* v. *United States,* 284 U.S. 421; *Virginia Ry. Co.* v. *Federation,* 300 U.S. 515; *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495.

Accordingly, the nature of the actual controversy in the particular litigation determines the scope and extent of the constitutional issue. The classic formulation of this principle is set forth in *Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39, as follows:

> * * * It [the Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

And, in *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 219–220, it was stated:

> * * * Of course, the argument to sustain the contention [of unconstitutionality] is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid.

Had the District Court followed this basic approach, subsections (a) and (c) would have been held to be constitutional. The opinion of the District Court implicitly concedes as much (R. 31).

Equally well settled is the rule that one who is not injured by the allegedly unconstitutional feature of a statute has no standing to challenge constitutionality. As Mr. Justice Brandeis stated for a unanimous Court in *Heald* v. *District of Columbia*, 259 U.S. 114, 123:

> * * * It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held [footnote citing cases omitted].

United States v. *Würzbach,* 280 U.S. 396, illustrates the operation of the rule. There, an indictment was brought under the Federal Corrupt Practices Act,[6] charging a representative in Congress with having received money from officers and employees of the United States for the political purpose of promoting his nomination at certain primaries. Upon direct appeal to this Court from an order quashing the indictment, Mr. Justice Holmes, speaking for the Court (280 U.S. at 339), said:

> It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. * * *

The case at bar is one to which the rule of "standing to challenge" clearly applies. The defendants here are state officials, and it is alleged that, while acting under color of law, they deprived Negroes, solely because of their race, of the right to register to vote (R. 1–4). The District Court permitted the defendants to challenge the validity of the Act on the ground that it might be applied to private action as well as to state action, although these defendants were engaged in state action when they performed the acts alleged in the complaint. Even if subsec-

[6] 43 Stat. 1070, 1073, now codified at 18 U.S.C. 602.

tions (a) and (c) did reach purely private action—which we believe it clear they do not—that fact could not in any way injure the defendants in this case.

The District Court relied upon *United States* v. *Reese,* 92 U.S. 214, in considering the effect of the Act in circumstances not before it. But more recent decisions, in addition to those cited, *supra,* show that, in this aspect of the case, the *Reese* approach has been discarded.

Thus, in *Jeffrey Mfg. Co.* v. *Blagg,* 235 U.S. 571, an action brought under the Ohio Workmen's Compensation Act, the employer argued that the Act violated the Equal Protection Clause in that it arbitrarily gave benefits to employees of businesses having more than four employees and unjustly discriminated against the employees of businesses having four employees or less. The Court stated (at p. 576):

> * * * The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. * * *

In *Blackmer* v. *United States,* 284 U.S. 421, the defendant had been convicted and fined for refusing to answer a subpoena to testify as a witness in a criminal trial. In this Court, the defendant argued, among other things, that the act under which the subpoena was issued was unconstitutional under the Sixth Amendment because it excluded defendants in

criminal prosecutions from the right to such a subpoena. This Court stated (at p. 442):

> * * * We need not consider whether the statute requires the construction for which the petitioner contends, as in any event the petitioner, a recalcitrant witness, is not entitled to raise the question. * * *

In *United States* v. *Harriss*, 347 U.S. 612, the Court refused to pass on the constitutionality of the penalty provision of the Lobbying Act when the case came to it on dismissal of the indictment, stating at page 627:

> * * * Unlike §§ 305, 307, and 308 which we have judged on their face, § 310(b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them.

In summary, it is settled both that one not affected by an allegedly unconstitutional provision in a statute may not challenge it and that the courts should consider only issues raised by the facts before them, not hypothetical issues. The District Court erred in not following these elementary rules.

B. CONSTITUTIONAL APPLICATION OF THE ACT SHOULD BE UPHELD AS SEPARABLE FROM THE APPLICATION DEEMED UNCONSTITUTIONAL

Even assuming the District Court did not err in determining that the Act was invalid because it might be applied unconstitutionally in a hypothetical case, its duty to avoid the destruction of an Act of Congress was not at an end. The court had the further duty of determining whether the valid application could be separated from the invalid and thus preserved.

The rule, as laid down by this Court, is that a statute should not be declared invalid as a whole if part is capable of being given effect, despite invalidity of the remainder. This principle was stated by Mr. Justice Brandeis in *Dorchy* v. *Kansas,* 264 U.S. 286, at 289–290 as follows:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. * * * But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail.

See also *The Abby Dodge,* 223 U.S. 166, 175; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30.[7]

There is in the present case no real issue as to whether the application of the statute is capable of separation with respect to state and private action. Clearly, the court could have construed the act as applicable only to state action, leaving for another day the questions that would arise if it should ever be sought to be enforced against private individuals not acting under color of law.

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[7] In *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y. 48 at 60, Judge Cardozo stated "In this state, we have gone far in subdividing statutes, and sustaining them so far as valid * * *. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment * * *. The principle of division is not a principle of form. It is a principle of function."

The only question remaining is whether Congress intended it to be so applied, even assuming (which we deny) that the Act covers purely private as well as state action and that the former should be held beyond the power of Congress. The Civil Rights Act of 1957 has no separability clause and the legislative history is silent on the subject. Therefore, the issue of separability must be resolved within the general context, purpose and policy of the Act. *The Employers' Liability Cases,* 207 U.S. 463, 501–502. See Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 91–101.[8]

In the case of the present legislation, the congressional intent to prohibit interference with voting rights on the basis of race by state officials, regardless of the power to give similar protection from interference by individuals, is undeniable. We shall explore the legislative history of the law at greater length in Point III, *infra,* pp. 38–55; here, a few references will suffice. The court below referred (R. 38–39) to the testimony of Attorney General Brownell on

[8] Judge Learned Hand, speaking for the Court of Appeals in *United States* v. *Dennis,* 183 F. 2d 201, affirmed, *Dennis* v. *United States,* 341 U.S. 494, stated with respect to *Reese* that (183 F. 2d at 214):

"Even when there is no 'separability' clause of any kind, the doctrine of *United States* v. *Reese* * * * does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Congress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional."

the bill that became the Act as follows: " 'These sections 4 and 5' (subsections (c) and (d) of the law as enacted) 'are added here as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area, and [do] not add to the substantive provisions of the statute.' " And again "'* * * our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof * * * is unconstitutional.' " As is noted below, *infra,* much of the testimony before the Senate Committee dealt with interference by state officials with the right of Negroes to vote. The report of the House Judiciary Committee and of a subcommittee of the Senate, similarly emphasized the importance of prohibiting state action as such. See, *infra,* pp. 46–53. The floor debates, too, showed the same particularized concern with state action. In short, even if it be assumed here that the proscriptions of the Act went beyond state action, it still cannot be doubted that Congress intended particularly to deal with state action and would have intended that application to stand regardless of the fate of the legislation in other respects.

The court below, relying on *United States* v. *Reese,* 92 U.S. 214, made no attempt to inquire into the purpose or policy of Congress with respect to saving the constitutional application of the Act. In *Reese,* Sections 3 and 4 of the Enforcement Act of 1870 were held invalid *in toto* because these provisions,

which the Court found to have been enacted in an attempt to enforce the Fifteenth Amendment, were not restricted to the deprivation of voting rights because of race or color. It was charged that the defendants in that case had, in fact, deprived Negroes of the right to vote because of their race. The Court, nevertheless, held those sections to be invalid *in toto*.

Distinctions between the statutory provisions involved in the *Reese* case and that involved here could be drawn. For example, the Court there was dealing with a criminal statute; and the requirement of specificity is more rigorously enforced, and properly so, with respect to criminal statutes. But there is no need to distinguish the *Reese* case because, for at least forty years, the approach there taken has not been followed by this Court.[9] See *e.g., El Paso & N.E. Ry Co.* v. *Gutierrez*, 215 U.S. 87, and the cases discussed at pp. 18–22, *supra*, in several of which the Court found that the statute was valid as applied and refused to consider the question of its validity, in hypothetical circumstances, in effect severing one application from the other.

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[9] During the approximate thirty-year period after the decision in the *Reese* case, the *Reese* approach was followed in a few cases. See, *e.g., Trade-Mark Cases*, 100 U.S. 82; *Illinois Central Railroad* v. *McKendree*, 203 U.S. 514; *The Employers' Liability Cases*, 207 U.S. 463; decided in 1879, 1906 and 1908, respectively. But, since then, it has generally been disregarded.

III

42 U.S.C. 1971 (a) AND (c) ARE CONSTITUTIONAL

A. INTRODUCTORY

The Fifteenth Amendment to the Constitution of the United States became effective on March 30, 1870. It declared that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 of that Amendment gave Congress the power to enforce the Amendment "by appropriate legislation." Two months later, on May 31, 1870, Congress passed a comprehensive act entitled "An Act to Enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." (16 Stat. 140.) Section 1 of that Act is now codified as 42 U.S.C. 1971(a) (the full text of which is set forth at p. 3, *supra*) which is the basic provision in controversy in this case.

In 1875, this Court was called upon to consider the validity of Sections 3 and 4 of the Enforcement Act and the scope and meaning of the Fifteenth Amendment. *United States* v. *Reese,* 92 U.S. 214. In discussing the reach of the Amendment this Court stated (at pp. 217–218):

> The Fifteenth Amendment * * * has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise

elective franchise on account of race,
r previous condition of servitude." This,
the express provisions of the second
of the amendment, Congress may en-
y "appropriate legislation."

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equent case, *James* v. *Bowman,* 190 U.S.
ourt held that the Fifteenth Amendment
ly to governmental action and that legisla-
orting to be an exercise of the power
Section 2 of the Amendment which pro-
s of private individuals was not "appro-
lation" within the meaning of that

. 1971(a) is the only remaining federal
provision which deals specifically and ex-
with the right to vote without distinction
hough there are other statutory provisions,
nal and civil, which protect constitutional
erally and are broad enough to include this
e judicial history of the Fifteenth Amend-
cases arising under it is, for the most part,
f invalidation of various attempts by states
acting under color of the laws of states, to
se the Negro, either overtly through statutory

. 18 U.S.C. 241 and 242, 43 U.S.C. 1983, and 1985.

enactments,[11] or covertly through discriminatory administration of voting laws,[12] or through discriminatory exclusion of Negroes from participation in the election process.[13]

In 1957, Congress added what appears as subsections (b) through (e) to the section as Section 131 of Civil Rights Act of 1957, 71 Stat. 634. Subsection (b)—which is not involved at all in this case—provided additional prohibitions against interference with the right to vote in federal elections. Subsection (c) authorized the Attorney General, in the name of the United States, to institute civil proceedings to enforce (a) and (b). Subsections (d) and (e), which are also not here involved, make procedural provisions with respect to suits under (c).

The present case is the first brought by the United States under 42 U.S.C. 1971 (a) and (c). It involves alleged racial discrimination by state officials with respect to registration for voting in the State of Georgia. The court below expressly held that subsection (c) is unconstitutional. In doing so, it also implicitly decided that 42 U.S.C. 1971(a) [14] is unconsti-

[11] See *e.g.*, *Guinn* v. *United States*, 238 U.S. 347; *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933.

[12] See *e.g.*, *Reddix* v. *Lucky*, 252 F. 2d 930 (C.A. 5); *Byrd* v. *Brice*, 104 F. Supp. 442 (W.D.La.); *Thornton* v. *Martin*, decided November 23, 1955 (M.D. Ga.), 1 Race Relations Law Reporter 213 (1956).

[13] See *e.g.*, *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875; *Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4).

[14] Previously 42 U.S.C. 1971; 8 U.S.C. (1946 ed.) 31; R.S. 2004; 16 Stat. 140. For a more detailed history, see *infra*, pp. 38–45. For the sake of clarity, the subsection will generally be referred to by its present designation.

tutional, since the difficulty which the court had with the Act arose not out of subsection (c) as such, but from the fact that this subsection was used to enforce the right secured by subsection (a). The court held that to be constitutionally valid under the Fifteenth Amendment, subsection (c) had to be limited to "state action." By concluding that the right secured by subsection (a) "is such a right of which a person can be deprived, by the act or practice of any other person, state official or private citizen" (R. 34), the court in effect held that subsection (a) could not be squared with the Fifteenth Amendment.[15] From this premise

[15] Although the court did not make explicit its view of the nature of the right secured by subsection (a), it apparently was addressing itself to the right to vote without distinction of race in elections involving only state or local candidates. Section 1971(a), of course, includes the right to vote without distinction of race in federal elections as well. See *Terry* v. *Adams*, 345 U.S. 461, 469. There can be no doubt that Congress has the power to prevent abuses in elections for members of Congress. *United States* v. *Classic*, 313 U.S. 299; *Ex parte Yarbrough*, 110 U.S. 651; *Ex parte Clarke*, 100 U.S. 399; *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Gale*, 109 U.S. 65. And there can be no doubt that citizens of the United States have a federal right, apart from the rights guaranteed by the Fourteenth or Fifteenth Amendments, to vote for members of Congress without discrimination. *Guinn* v. *United States*, 238 U.S. 347. This right can be protected against deprivations by private actions. See *United States* v. *Williams*, 341 U.S. 70, 77 (opinion of Frankfurter, J.). It is to be noted that the *Guinn* case involved what is now Section 1971(a) and that in *Williams*, *Guinn* was cited with approval for the proposition that interference by private action with the right to vote in elections for members of Congress is an offense (under 18 U.S.C. 241). 341 U.S. at 80.

We assume, therefore, that when the court below declared subsections (a) and (c) to be unconstitutional, it had reference to a possible hypothetical application of those subsections to private acts and practices which would deprive others of the

followed the conclusion that subsection (c), insofar as it provided for the enforcement of subsection (a) rights, was invalid. On the other hand, if, as we contend, subsection (a) is not unconstitutional because it applies only to state action, then the assumed invalidity of subsection (c) also falls, for, as the District Court recognized, subsection (c) enforces no more than what is granted as a right by subsection (a).[16]

The court's construction of subsection (a) is erroneous, as is its conclusion with respect to subsection (c). The court disregarded the plain meaning of the language of the statute. It disregarded the decisions of this and the other federal courts; and it disregarded the policy of Congress in enacting this subsection as a part of the Civil Rights Act of 1957.

B. THE LANGUAGE OF 42 U.S.C. 1971 INDICATES THAT SUBSECTIONS (a) AND (c), WHEN TAKEN TOGETHER, ARE CONCERNED ONLY WITH ACTION WHICH CAN BE DEEMED "STATE ACTION"

Section 1971(c) provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute * * * a civil action * * *." The District Court correctly concluded that only rights declared in subsection (a) or (b) can be enforced by means of subsection (c). Accordingly, if the right secured by subsection (a) is addressed only to

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right to vote without distinction of race in state and local, but not federal, elections. Whether, and to what extent, these subsections would be unconstitutional if they actually had such application is, of course, a question that need not be reached in this case.

[16] Except for the here not pertinent enforcement of subsection (b) rights.

deprivations by persons engaged in "state action", then, with respect to its enforcement of subsection (a), subsection (c) is also so limited.

The basic structure of the statute, in the relationship of subsections (a), (b) and (c), clearly indicates that subsection (a) was intended to apply only to state action. Subsection (a) deals with Fifteenth Amendment rights, subsection (b) with the protection of the right to vote in federal elections, and subsection (c) with the enforcement of the two prior subsections. Thus subsection (b), which was intended to reach action by private persons as well as state action interfering with federal elections where federal power did not depend on the Fifteenth Amendment, specified that the prohibited action may be by any "person * * * whether acting under color of law or otherwise".[17] By contrast, subsection (a) makes no reference to any "person" nor does it use the phrase "whether acting under color of law or otherwise." Thus, the language of these two subsections is a clear indication that the first was intended to prohibit state action only.[18]

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[17] This subsection is clearly patterned on 18 U.S.C. 594, and in fact uses almost the identical language of the criminal statute. However, the clause "whether acting under color of law or otherwise" has been added. Since this clause was not added to change the coverage of the civil remedy from that provided in the criminal statute, it must have been added to differentiate subsection (b) from (a) so far as the acts of private persons are concerned.

[18] The reliance of the court below on the words "any person" in subsection (c) (R. 32) as indicating that action thereunder to enforce (a) was applicable to private persons is not warranted. Subsection (c) implements not only (a) but also (b). Therefore, the reference to "any person" was necessary to reach the private persons covered by (b) and is no indication whatever that (a) was intended to have a like application.

The language in subsection (a), "shall be entitled and allowed to vote * * * without distinction of race," also suggests that subsection (a) is concerned with state action. The word "entitled" in common understanding refers to a legal right or privilege. The word "allowed" ordinarily means permitted, and in the context of this subsection, means not only that the voter shall be entitled by law to vote, but that he shall be permitted to vote without distinction of race by those who carry out election functions. The District Court gave to the word "entitled" its ordinary meaning, "entitlement to vote can come from the state alone" and, "is a legal status, which can neither be conferred nor denied by a private citizen" (R. 34). But the court's construction of the term "allowed," when read in the context of the Act, was most strained. It stated that "[o]ne who is prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot" (R. 34). But it is clear that when Congress intended to proscribe acts of intimidation, threats, or coercion, it used those terms, as it did in subsection (b) of the Act, and as it did in Section 6 of the Enforcement Act of 1870 (now 18 U.S.C. 241).

Subsection (a), after declaring that all citizens shall be entitled to vote without distinction of race, provides that this right exists, "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause plainly indicates that subsection (a) relates to state action. The entire "not-

withstanding" clause would be superfluous if its purpose was not to incorporate the state action concept. Its only other imaginable purpose—to assure the supremacy of the subsection over state law—is hardly a plausible one, for Article VI of the Constitution accomplishes that purpose so much more directly and effectively that its mere repetition here would have been a redundancy. Congress was legislating against the background of the Civil War and the known reluctance of the states of the former Confederacy to grant the franchise to the liberated former slaves. Patently, it was to assure that those or other states could not in the future discriminate in the electoral process on account of race or color that the "notwithstanding" clause was added to the section.

Subsection (a), when read as a whole, thus leaves no doubt that it is an implementation of the Fifteenth Amendment. The declaration of the right to vote without distinction of race is the heart of the section, as it is with the Amendment. Fifteenth Amendment language is reflected even in the concept that it is "citizens"—rather than persons generally or individuals—whose right to vote is guaranteed. Just as the Fifteenth Amendment incorporates the concept of state action, so does Section 1971(a).

All of these considerations point to these conclusions—that subsection (a), in its application to state and local elections, is only as broad as the Fifteenth Amendment; that it is limited to actions taken under "color of law;" and that it constitutes a valid implementation of the Amendment.

C. DECISIONS OF THIS COURT AND THE LOWER FEDERAL COURTS HAVE RECOGNIZED AND APPLIED SECTION 1971(a) AS A PROPER IMPLEMENTATION OF THE FIFTEENTH AMENDMENT

42 U.S.C. 1971(a) was given full force and effect by this Court in the recent case of *Terry* v. *Adams*, 345 U.S. 461. It was there held that the section was adopted by the Congress "[a]cting pursuant to the power granted by the second section of the Fifteenth Amendment" (345 U.S. at 468). Moreover, the action in that case was sustained on the basis of Section 1971(a) and of the Amendment. The District Court in the instant case declined to follow the *Terry* decision and other similar holdings on the ground that none of the cases was exclusively based upon Section 1971(a), but that, on the contrary, Section 1983—which incorporates the "color of law" concept in its language—was always used in addition to Section 1971(a).[19] From this, the court thought that the decisions upon which the Government relied could not be construed as square holdings that Section 1971(a) incorporates the "state action" concept and hence was constitutional. It is clear that, at least with respect to the *Terry* case, the court plainly erred in this analysis.

In *Terry* certain Negro citizens in Fort Bend County, Texas, had brought a class action against

[19] The court said that "[i]t will be noted that in any suit filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practices resulted in a person being deprived of the right to vote on account of his race" (R. 29–30).

officers of the Jaybird Democratic Association alleging that the practices of the Association in refusing to permit Negroes to vote in their privately held pre-primary elections violated the rights of the plaintiffs under the Constitution and laws of the United States. The plaintiffs originally rested their claims on the Fourteenth and Fifteenth Amendments, 42 U.S.C. 1971(a) (then 8 U.S.C. (1946 ed.) 31), 42 U.S.C. 1983 (then 8 U.S.C. (1946 ed.) 43), and 42 U.S.C. 1985 (then 8 U.S.C. (1946 ed.) 47). However, in the course of the proceedings, reliance on Sections 1983 and 1985 was abandoned, and the constitutional amendments and Section 1971(a) remained as the sole basis for the action.[20] Accordingly, this Court, in deciding the case in favor of the plaintiffs, completely disregarded Sections 1983 and 1985 and based its ruling squarely on Section 1971(a) and on the Fifteenth Amendment. This is made clear by specific references in several of the opinions.

The opinion of Mr. Justice Black (in which Mr. Justice Burton and Mr. Justice Douglas joined) refers only to Section 1971(a) as sustaining the cause of action, as follows (345 U.S. at 468–469):

> Acting pursuant to the power granted by the second section of the Fifteenth Amendment, Congress in 1870 provided as follows: [quoting what is now 42 U.S.C. 1971(a)]
>
> The Amendment, *the congressional enactment* and the cases make explicit the rule against racial discrimination in the conduct of elections. Together they show the meaning of

[20] Initially, both damages and injunctive relief were sought, but the plaintiffs subsequently abandoned their prayer for damages.

> "elections." Clearly the Amendment includes any election in which public issues are decided or public officials selected. Just as clearly the Amendment excludes social or business clubs. And *the statute* shows the congressional mandate against discrimination whether the voting on public issues and officials is conducted in community, state or nation. Size is not a standard. [Emphasis added.]

Mr. Justice Frankfurter, in his concurring opinion, after finding that "the State authority has come into play" sufficiently to bring the activity of the Jaybird Association within the meaning of state action, concluded with this statement concerning the relief which could be appropriately granted by a court of equity (345 U.S. at 475, 477):

> * * * What must be done is that this county be rid of the means by which the unlawful "usage," R.S. § 2004, 8 U.S.C. § 31 [42 U.S.C. 1971(a)], in this case asserts itself.

And the other concurring Justices, speaking through Mr. Justice Clark, indicated that the "Petitioners mainly rested their claims on the Fourteenth and Fifteenth Amendments, and [on Section 1971(a)]"[21] and they "abandoned a claim to money damages, apparently grounded on [Sections 1983 and 1985]."[22] Thus, it is quite apparent that the case was decided solely on the basis of Section 1971(a) as an implementation of the Fifteenth Amendment. The Court treated the cause of action in *Terry* v. *Adams* as arising under 42 U.S.C.

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[21] 345 U.S. at 478, note 2.

[22] 345 U.S. at 478, note 3.

1971(a); it stated that that section was enacted "pursuant to the power granted by the second section of the Fifteenth Amendment"; and it approved the application of the statute to the facts of the case.

In addition to *Terry* v. *Adams,* Section 1971(a) has been invoked in many other cases which directly involved and turned on the question of whether the defendants had engaged in forbidden "state action", and in all of these cases it was held that they had.

In *Reddix* v. *Lucky,* 252 F. 2d 930, decided by the Court of Appeals for the Fifth Circuit in 1958, Sections 1971(a) and 1983 were relied on in an action to prevent a registrar of voters from discriminating against Negroes because of their race. With respect to Section 1971(a), the court stated (252 F. 2d at 933):

> Congress has implemented the Fifteenth Amendment, as it is authorized to do by its second paragraph, by the adoption of the Act of May 31, 1870, c. 114, § 1, 16 Stat. 140, formerly codified at 8 U.S.C.A. § 31; now 42 U.S.C.A. § 1971. * * *

Other decisions of a similar nature are *Smith* v. *Allwright,* 321 U.S. 649, *Nixon* v. *Condon,* 286 U.S. 73, *Baskin* v. *Brown,* 174 F. 2d 391 (C.A. 4); *Rice* v. *Elmore,* 165 F. 2d 387 (C.A. 4); *Chapman* v. *King,* 154 F. 2d 460 (C.A. 5), certiorari denied, 327 U.S. 800.

D. THE LEGISLATIVE HISTORY OF 42 U.S.C. 1971(a) CLEARLY DEMONSTRATES THAT IT HAS, AT ALL TIMES, BEEN INTENDED TO APPLY ONLY TO STATE ACTION

Section 1971(a) of 42 U.S.C. first appeared as Section 1 of the Enforcement Act of May 31, 1870.

Thereafter, unlike the remainder of the Act which was generally either repealed by Congress or declared unconstitutional by the courts, it remained in the statutes and received judicial enforcement, see *supra*, pp. 27–29. When the Civil Rights Act of 1957 was passed, 42 U.S.C. 1971(a) was included in Part IV of that Act. As the discussion below will show, it is clear that Congress has regarded 42 U.S.C. 1971(a), since its inception, as an implementation of the Fifteenth Amendment to the Constitution and applicable, therefore, only to state action.

1. The Legislative History of Section 1971(a) as Enacted in 1870 Shows That It Was Intended to Implement the Fifteenth Amendment

On April 19, 1870, there was introduced in the Senate and referred to the Committee on the Judiciary S. 810, a bill "to enforce the fifteenth amendment to the Constitution of the United States."[23] 90 Cong. Globe 2808. On April 25, S. 810 was reported out of committee with an amendment in the nature of a substitute for the bill. 91 Cong. Globe 2942. The substitute bill contained twelve sections dealing with the protection of voting rights and provided penalties for illegal individual action. 91 Cong.

[23] On February 21, 1870, H.R. 1293, a bill "to enforce the right of citizens of the United States to vote in the several States of this Union who have hitherto been denied that right, on account of race, color, or previous condition of servitude" was introduced in the House (89 Cong. Globe 1459) where it was later passed. It bore little resemblance to the Senate bill which was enacted into law. The bill as enacted was entitled a bill "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." 92 Cong. Globe 3915.

Globe 3479–80. Section 1 of the bill, which reads almost exactly like 42 U.S.C. 1971(a), provided (91 Cong. Globe 3479):

> That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.[24]

Sections 2 and 3 applied to election officials, the former requiring them to give equal "opportunity" to all and the latter declaring that a person who meets the state qualifications to vote shall be eligible to vote and that an official who refused to allow him to vote would be held liable. Section 4 struck at anyone who interfered by bribery, threat, or force

[24] When the bill passed the Senate, it had been amended to insert the word "constitution" between the adjective "any" and the noun "law" in the last clause. This was its wording as the Act of May 31, 1870, c. 114, Section 1, 16 Stat. 140. When the Revised Statutes of the United States were enacted in 1874, it appeared as Section 2004 with the words "or shall be", previously following the words "who are" and preceding the words "otherwise qualified" in the first clause, omitted. This is the present wording. The section also appeared in the United States Code from 1926 to 1952 as Section 31 of Title 8. In the 1952 edition of that work it was transferred to 42 U.S.C. 1971. In 1957, Public Law 85–315, Section 131(a), amended the catchline to read "Voting rights." Section 131(b) of P.L. 85–315 designated it as 42 U.S.C. 1971(a).

with the exercise of his right to vote. Section 5 allowed a writ of mandamus to be used by a defeated candidate if he lost as a result of a violation of the Act. Sections 6 through 10 set up the machinery for the enforcement of the Act, and Sections 11 and 12 permitted the President to use judges, marshals, United States Attorneys or the military forces to ensure enforcement.

Section 4 of S. 810 is the only one of the measures not specifically directed to state officials that received any consideration during the debate. Senator Stewart of Nevada stated the importance of this Section to the proponents of civil rights legislation as follows (91 Cong. Globe 3560):

> The fourth section standing alone is worth more than the whole House bill put together. It makes it an offense to interfere with the registration by outsiders and for outsiders or anybody to interfere with voters.

Senator Thurman of Ohio found fault with every section of the bill (91 Cong. Globe 3485) and was particularly concerned about its effect on individual action. He felt that the Fifteenth Amendment did not warrant action against "individuals—not officers of a State at all, mere private individuals, mere trespassers, mere breakers of the peace, mere violators of State law" (91 Cong. Globe 3661). However, all that he could say of Section 1 was this (91 Cong. Globe 3485):

> The only observation I have to make about that is that the thing is wholly unnecessary and nugatory if the fifteenth amendment is a part

Constitution of the United States. You
add any strength to the fifteenth con-
nal amendment by putting the very
al provision of that amendment into the
of a statute. The whole thing, therefore,
ly inofficious and nugatory.

is, when the Senate had discussed the
ion 3 on registration, Senator Morton of
knowledging that the Senate-rejected
d been confined to subjects contained in
n Amendment,' stated (91 Cong. Globe

he attention of the Senate to the fact that
provisions of the Senate bill are general,
t reference to the fifteenth amendment,
the first section, and that contains no
v at all, but is simply declaratory of the
ment itself. The first section might be
t so far as that is concerned, because it is
declaratory of the amendment itself.
endment relating to "individual" action
d by Senator Pool of North Carolina
be 3679). To be inserted as Sections 6
directed at conspiracies and masked
used terrorist methods to deprive Ne-
constitutional rights. It also provided
jurisdiction in a state court if the same
the laws of the state. The amendment
vithout debate and was not specifically
any of the later debate.
some supporters of the bill intended
st to apply to individual action. Sen-
ward of Michigan, and Morton spoke

as though the Fifteenth Amendment were broad enough to permit the Government to reach individual action. See, *e.g.*, 91 Cong. Globe 3611, 3655, 3670–1. Others, exemplified by Senators Casserly of California and Sherman of Ohio, restricted this to mean individuals acting under color of law. See, *e.g.*, 91 Cong. Globe 3671, 3663. Opponents of the bill such as Senators Thurman of Ohio and Davis of Kentucky could not seem to accept even this limited interpretation. See, *e.g.*, 91 Cong. Globe 3661, 3666. However, the defeat of an amendment by Senator Vickers (of Maryland), which would have inserted the words "under or by color of State authority" in Section 4, indicates that the majority did not want such a limitation in this section. 91 Cong. Globe 3684.

On May 20, 1870, the Senate passed the bill. 91 Cong. Globe 3690. Since the Senate version of the measure differed from that passed by the House, a conference was required. The conference committee accepted the Senate version. 91 Cong. Globe 3752.

Debate on the conference bill then ensued in the House. Three representatives—two in opposition to the bill and one in favor—commented on the effect of Section 1. All agreed that it was declaratory of the Fifteenth Amendment.

Representative Kerr of Indiana spoke against the bill, but even he said that "every single section of this bill * * * save only the first, involves a palpable violation of the spirit and letter of the Constitution." 92 Cong. Globe 3872.

Representative Swann of Maryland, also an opponent of the bill, stated that Section 1 was "affirmatory

only of the fifteenth amendment * * *." 94 Cong. Globe 432.

Representative Davis of New York, a proponent of the bill who had served on the conference committee, after noting that Representative Kerr had said that the bill, except for the first section, was unconstitutional, stated: "The first section is substantially a recital of the provisions of the Constitution." 92 Cong. Globe 3882.[25]

Although some proponents of the Civil Rights Act of 1870 believed that the Fifteenth Amendment cleared the way to federal restrictions against individual action not under color of law, this is not to indicate that Section 1 restated this concept. The opponents of the bill, who repeatedly parried the thrust at individual action made by Section 4, would hardly have treated Section 1 in the offhand manner that they did if it was understood also to be aimed at individual action. The critical examination by Senator Hamilton points out (94 Cong. Globe 357) that if Section 1 had faults, they were not in the area of "individual action." Section 1 was never referred to as applying

[25] Although the District Court conceded that Section 1 of the Enforcement Act stated only "general principles," it suggested, nevertheless, that the section may be unconstitutional. The court's theory runs as follows: Passage of the bill with other provision for dealing with deprivation of voting rights by individuals shows that those who favored the bill believed that the Fifteenth Amendment controlled individual as well as official action. Therefore, Section 1 as well, though it does not specifically say this, might just as well have been intended to apply to individual action. If this were so, however, it seems strange that even the most vigorous opponents of the bill (after attacking its unconstitutional provisions) conceded, as we have shown above, that Section 1 was constitutional.

to individual action at a time when the issue of "state action" and "individual action" was very sharply drawn. The "strict constructionists" of the Fifteenth Amendment accepted Section 1 as constitutional, indicating that in their views it was limited to state action. And there is no evidence of the expression of a contrary view by anyone with respect to this section.

2. The Legislative History of the Civil Rights Act of 1957 Demonstrates that Congress Intended by Section 1971(a) When Used in Conjunction With Section 1971(c), to Proscribe Only Those Acts and Practices Which Violate the Fifteenth Amendment

An examination of the history of the Civil Rights Act of 1957, as reflected in the committee reports and hearings and the debates, shows clearly that Congress was fully aware of the fact that, since the constitutional foundation for 42 U.S.C. 1971(a) is the Fifteenth Amendment, the effect of Section 1971(a) is limited to situations in which illegal action has been taken in the course of the electoral process under color of state law. This is shown by direct comment concerning the effect of Section 1971(a). It is also demonstrated by the fact that, in enacting new legislation affecting illegal individual action (Section 1971(b)), Congress took great care to state that such legislation was limited to elections for federal office.[26]

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[26] Prior proposals for civil rights legislation in recent years followed the same pattern as the Civil Rights Act of 1957 in differentiating between the Congressional power to prohibit interference by anybody in federal elections as contrasted with the limited power to prohibit state action on the basis of race or color in other elections. Thus, in 1949, following the report of the President's Committee on Civil Rights (*To Secure These Rights* (1947) pp. 160–161) and President

Moreover, the hearings and debates are replete with references to state officials as potential defendants, and great emphasis is placed on instances of violations of voting rights under state authority. Finally, there are repeated assertions in both the hearings and the debate that the bill grants no new rights but only a new remedy in addition to the then existing criminal sanctions, *i.e.*, the use of the injunctive action by the Attorney General.[27] Thus, contrary to the conclusion reached by the District Court, it seems obvious that Congress regarded Section 1971(a), read alone, or with Section 1971(c), as applicable to state action only.

a. Hearings

The bill which ultimately became the Civil Rights Act of 1957 was H.R. 6127, introduced by Representative Celler, chairman of the Committee on the Judi-

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Truman's message to Congress (94 Cong. Rec. 927–928), H.R. 4682 and S. 1725 followed the same structure as the present law. These bills did not pass either house, but the same proposals were introduced in succeeding sessions. (*E.g.*, 82d Cong., 1st Sess. (1951), H.R. 29, introduced by Rep. Celler; 2d Sess. H.R. 5945, introduced by Rep. Javits; 83d Cong., 1st Sess. (1953) H.R. 405, introduced by Rep. Celler; 84th Cong., 1st Sess. (1955), H.R. 627, introduced by Rep. Celler, S. 907, introduced by Sen. Humphrey.) The immediate predecessor of the 1957 Act was H.R. 627, 84th Cong., 2d Sess., introduced by Representative Celler. The hearings (Hearings before the Committee on Rules, House of Representatives, 84th Cong., 2d Sess., p. 47) and the Committee report (Report of House Committee on the Judiciary, H. Rep. No. 2187, 84th Cong., 2d Sess., on H.R. 627) make clear that Congress then realized, as it had before and since, that in so far as elections other than federal were concerned, the limitations of the Fifteenth Amendment were binding.

[27] Addition of a right to federal protection against individual interference in non-federal elections of course would have added a new right, not merely a new remedy.

ciary. A companion measure, S. 83, was sponsored by Senator Dirksen [28] and thirty-six other members of the Senate. Both bills embodied the proposals of the Administration for civil rights legislation [29] and the views of the Attorney General as to the meaning and purpose of the bills are therefore particularly important. Attorney General Brownell, testifying in support of S. 83, made it clear that he regarded Section 1971(a) as having application only to state action. At the same time he indicated to the committee the limited area in which individual illegal action in elections could be affected by federal law. Thus he said: [30]

> Beyond the provisions of the 14th and 15th amendments, *which inhibit only official action,* Congress has the broad power to protect voters in elections for Federal offices from action by private individuals which interferes with the right of the people to choose Federal officials.
>
> As the Supreme Court said in 1941 in *United States* v. *Classic* (313 U.S. 299, 315), this right to choose—
>
> "is a right secured by the Constitution * * * And since the constitutional command is without restriction or limitation, the right, unlike

[28] The Senate bill was never reported out of the Judiciary Committee. The Senate instead took up directly, debated, and passed the House bill.

[29] Cf. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. (hereinafter referred to as 1957 Senate Hearings), p. 1; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess. (hereinafter referred to as 1957 House Hearings), p. 589.

[30] 1957 Senate Hearings, pp. 2–3.

> those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of States."
>
> Congress passed many years ago statutes, now title 42, United States Code, sections 1971 and 1983, under which private persons claiming that they had been deprived of the right to vote on account of race or color *by persons acting under color of State law* have been able to bring civil suits for damages and preventive relief. [Emphasis added.]

In his testimony before the House committee, Attorney General Brownell further stated that none of the four proposals recommended for enactment as civil rights legislation—including, of course, the reenactment of 42 U.S.C. 1971 as 42 U.S.C. 1971(a)—would extend the area of civil rights jurisdiction in which the Federal Government was entitled to act. He continued: [31]

> * * * the enactment of our proposals * * * would permit the Federal Government to take civil remedial action instead of having to depend solely upon criminal procedures.[32]

It is clear from Mr. Brownell's remarks that he viewed the bills as creating only new civil remedies in areas which had previously been held to be constitu-

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[31] 1957 House Hearings, p. 591. See also, 1957 House Hearings, pp. 606-607.

[32] The available criminal sanctions are explained in the 1957 Senate Hearings, at p. 3. It is there stated that they consist of 18 U.S.C. 241 and 594 when actions by private individuals interfering with federal elections are concerned, while 18 U.S.C. 242 may be used to prosecute persons acting under color of law to deprive individuals of their right to vote in any election because of race, color, religion or national origin.

tionally open to the Federal Government. His view is of course at odds with that of the District Court here, which interpreted the Act as attempting to create a right to reach private action where none existed previously.

Representative Celler concurred in the view of the Attorney General as to the meaning of the bill. In the course of hearings before the House Rules Committee, Mr. Celler was given a hypothetical situation of a threat to boycott anyone who voted for a particular candidate for local office, in an election in which both federal and local offices were at stake. Mr. Celler was asked whether in his opinion the boycott would constitute a violation of the Act, inasmuch as it might cause voters to stay away from the polls and thereby affect the Congressional election. While he hesitated to comment on the particular fact situation, he stated that in so far as individual action was covered by the bill it could be so only with respect to election for federal office. As he put it: [33]

> As I see this generally, the commitment and the intimidation and the coercion have to be directed against a Federal candidate. If it is directed against a local candidate who runs at the same time with a Federal candidate, it is unfortunate, but I do not think that this statute would get him.

It is noteworthy that in the testimony in both the House and the Senate Hearings strong emphasis was laid on violations of voting rights by state officials who were viewed as potential defendants in suits

[33] Hearings before the Committee on Rules, House of Representatives, 85th Cong., 1st Sess., on H.R. 6127, p. 44.

brought under the Act. The testimony of Attorney General Brownell refers repeatedly to the illegal conduct of state officials (1957 Senate Hearings, 1ff., 46ff., 180ff., especially pp. 3–7, 36, 77, 81, 183, 189, 205, 209). The statement of Assistant Attorney General Warren Olney III,[34] then in charge of the Criminal Division (in which civil rights cases were at that time handled), incorporated into the 1957 Senate Hearings at p. 237, is concerned with illegal actions of registrars. Likewise, Mr. Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, pointed out numerous instances of deprivation of voting rights by public officials. 1957 Senate Hearings, 291ff.[35] It is true that such allegations of state infringement of voting rights were vigorously contradicted by some of the legislators and state officials who denied the existence of state-inflicted discrimination.[36] But the point

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[34] Supplemental statement by Assistant Attorney General Warren Olney III in response to questions by members of the Senate Subcommittee on Privileges and Elections, October 10, 1956. See also his letter of February 21, 1957, on the same subject, in 1957 House Hearings, p. 1219.

[35] See also his testimony in 1957 House Hearings, pp. 656, 659; testimony of Rep. Powell, 1957 House Hearings, p. 681; testimony of Chief Assistant Attorney General Gallion of the State of Alabama, 903ff.; and testimony of witnesses introduced by the N.A.A.C.P., 1957 Senate Hearings, pp. 502ff., Mr. Charles A. McLean; pp. 532ff., Mr. Gus Courts; pp. 564–565, Rev. W. D. Ridgeway.

[36] 1957 Senate Hearings, p. 261, Sen. Talmadge; pp. 270, 308, Sen. Ervin; p. 450, Asst. Atty. Gen. Grant of Texas; 1957 House Hearings, p. 738, Gov. Coleman of Mississippi; p. 808, Rep. Lanham; p. 989, Attorney General Gremillion of Louisiana; p. 1173, Attorney General Bennett of Arkansas.

is that the measure was generally understood to be aimed only at state action.

b. Committee Reports

In the Report of the Judiciary Committee of the House (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 13–15), there is reproduced a letter from the Attorney General to the Speaker of the House which discusses (1) the scope of Section 1971(a), and (2) the changes the Department of Justice proposed in connection with voting rights. In this letter, the Attorney General made this statement: [37]

> The existing civil voting statute (sec. 1971 of title 42, U.S.C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. *The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law.* In the interest of proper law enforcement to guarantee to all of our citizens the rights to which they are entitled under the Constitution, I urge consideration by the Congress * * * of three changes.
>
> First, addition of a section which will prevent anyone from threatening, intimidating, or coercing an individual in the exercise of his right to vote, whether claiming to act under authority of law or not, in any election, gen-

[37] H. Rep. No. 291 at p. 15. The letter, dated April 9, 1956, discusses the Administration's 1956 proposals for civil rights legislation. Since the same recommendations were made in 1957 this letter was incorporated into the 1957 reports.

> eral, special, or primary, concerning candidates for Federal office. [Emphasis added.]

As indicated above (p. 47), the interpretation placed upon the proposals by the Attorney General deserves particular consideration, in light of the fact that Administration proposals were here involved.

The Report (pp. 11–12) made it clear that Congress understood (1) that Section 1971(a) could apply only to cases involving state action, and (2) that individual interference with voting rights was reachable under federal law only in elections for federal office. In the first place, the only reference to an application of Section 1971(a) occurs in conjunction with Section 1983,[38] which provides sanctions only against state action. Secondly, the only provision with which the Report shows concern as to constitutionality is that dealing with application of Section 1971(b) to interferences by individuals in federal elections. The Report states (p. 12):

> Insofar as the right of Congress to protect voters in elections for Federal offices from interference by action of private individuals, as distinguished from official action under the color of law, is concerned, again the ruling in the case of *U.S.* v. *Classic, supra* [313 U.S. 299],

[38] 42 U.S.C. 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

> is controlling. Under that ruling the right to choose [federal officers]—
>
> "is a right secured by the Constitution * * * and since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of States * * *."

The Report also indicates (pp. 5–6)—as did the Attorney General—that the proposed legislation would not increase the area of civil rights jurisdiction in which the Federal Government is entitled to act, but would merely substitute civil for criminal remedies in an already established field.

The Report of the Subcommittee on Constitutional Rights of the House Judiciary Committee,[39] also, clearly shows that interference with voting by private individuals was to be affected by the Act only with respect to elections for federal office. Thus, in the only reference to protection against individual action, it states that:

> This subsection [1971(b)] makes clear that it is unlawful for a private individual as well as one acting under color of law to interfere with the right to vote at any general, special, or primary election *concerning Federal offices* [Emphasis added; 103 Cong. Rec. 11476].

c. Floor Debate

Throughout the debate on the bills, the legislators in both Houses viewed what is now Section 1971(a) as

[39] Report to accompany S. 83, 85th Cong., 1st Sess., Subcommittee Print. This Report is reproduced in 103 Cong. Rec. 11475.

implementing the Fifteenth Amendment.[40] Throughout the debate we find that state officials are regarded as potential defendants.[41] And, as occurred during the hearings, opponents of the legislation denied the need for legislation to protect voting rights, disclaiming state infringement of these rights.[42]

Senator Douglas explained the dual constitutional basis for the protection provided for voting rights by the proposed legislation: (1) Article I of the Constitution (with respect to private or state action which interferes with federal elections), and (2) the Fifteenth Amendment (with respect to state action which interferes, by reason of race or color, with the exercise of the franchise in federal or state elections). He said (103 Cong. Rec. 10988):

> Not only does Congress have the power, but it also has the duty to protect this right to vote against interference by State officials under not only the 15th but also the "equal protection of the laws" clause of the 14th amendment.

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[40] See, 103 Cong. Rec. 12150, Senator Neuberger; 12564, 13112, Senator Knowland; 12829, Senator Humphrey; 13188, Senator Bush; 13876, Senator Hruska; 13324, Senator Church; 13333, Senator Allott; 13319, Senator Kuchel; 13322, Senator Case (N.J.).

[41] See, 103 Cong. Rec. 12149, Senator Clark; 13120, 13126, Senator Humphrey; 8498, 9396, Rep. Keating; 8705, Rep. Diggs; 12828, Senator Douglas; 12898, 12900, 13006, 13732, Senator Javits; 13320ff., Senator Case (N.J.).

[42] 103 Cong. Rec. 13881, Senator Sparkman; 16402, Senator Thurmond; 8653, Rep. Frazier; 8856, Rep. Lanham; 11697, Senator Holland; 11698, 12898, Senator Ervin; 12310, 11684, Senator Long; 11081, Senator Fulbright. Cf. remarks of Rep. Celler, 9020.

> Furthermore, the Supreme Court has held (*United States* v. *Classic* (313 U.S. 299)) that this right to vote in Federal elections is also guaranteed by article 1, section 2 of the Constitution, and can be protected by the Federal Government against infringement by individuals as well as by State or local bodies.

Repeatedly the point was made in the debates that the proposed law did not enlarge on existing rights, but merely implemented those in existence.[43]

Thus, in the light of the legislative history of Part IV of the Civil Rights Act of 1957, as well as of the preceding proposals closely related to that portion of the Act, it is manifest that the Congress was fully aware that the legislation now embodied in 42 U.S.C. 1971 would empower the Attorney General to act under two separate and distinct sources of authority, the one applicable to both private and state action but limited to federal elections; the other extending not only to federal elections but also to state elections, but limited to acts of discrimination by or under the authority of a state. 42 U.S.C. 1971(a) embodies the latter concept.

E. 42 U.S.C. 1971(a) AND (c) CAN AND SHOULD BE CONSTRUED SO AS TO SAVE RATHER THAN TO DESTROY THEM

It is submitted that the foregoing analysis demonstrates that 42 U.S.C. 1971(a) and (c) were intended to be, and in fact are, limited to actions which Congress may constitutionally reach under the Fifteenth Amendment. However, even if the District Court

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[43] 103 Cong. Rec. 8498, Rep. Keating; 11834, Senator Ives; 13139, Senator Bush; 13876, Senator Hruska.

ubt about the constitutionality of these sub-
should have construed them so as to sustain
titutionality. For a statute is presumed to
"until its violation of the constitution is
beyond all reasonable doubt." *Ogden* v.
12 Wheat. 213, 270. And if a serious doubt
to the constitutionality of a statute, it must
ued, when fairly possible, so as to meet the
of the Constitution. In other words, if these
ctions could be read to apply either to state
ne or to both private and state action with
purely state and local elections, they should
construed so as to exclude their possible
n to purely private actions.

urt has consistently followed this principle
ry construction, even in cases which pre-
ch more serious problems of interpretation
resented here. Thus, in *United States* v.
5 U.S. 41, where it was contended that a
olution regulating lobbying activities was
ional, in that it reached activities which
d the power of Congress to regulate, Mr.
ankfurter, speaking for the Court, stated

* [T]he phrase "lobbying activities" in
esolution must be given the meaning that
fairly be attributed to it, having special
rd for the principle of constitutional ad-
ication which makes it decisive in the choice
fair alternatives that one construction may
se serious constitutional questions avoided

by another. In a long series of decisions we have acted on this principle. In the words of Mr. Chief Justice Taft, "[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." *Richmond Co.* v. *United States,* 275 U.S. 331, 346. Again, what Congress has written, we said through Mr. Chief Justice (then Mr. Justice) Stone, "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *Lucas* v. *Alexander,* 279 U.S. 573, 577. As phrased by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 and cases cited.

Mr. Justice Holmes thus stated the rationale of the rule in *Blodgett* v. *Holden,* 275 U.S. 142, 147–148:

> Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.

See also *Ashwander* v. *T.V.A.*, 297 U.S. 288, concurring opinion by Mr. Justice Brandeis at 346–348, and authorities cited. And see, *Coffman* v. *Breeze Corporations*, 323 U.S. 316, 324–325; *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569; *United States* v. *Petrillo*, 332 U.S. 1; *United States* v. *Harriss*, 347 U.S. 612, 618; *Screws* v. *United States*, 325 U.S. 91.

In *Hurd* v. *Hodge*, 334 U.S. 24, this Court construed the general language of 42 U.S.C. 1982, forbidding interference with property rights, as limited to governmental actions, a direct precedent for a similar interpretation here.

The District Court disregarded these authorities and gave to the Act here involved a strained construction which would render it unconstitutional. This was plain error.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed.

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